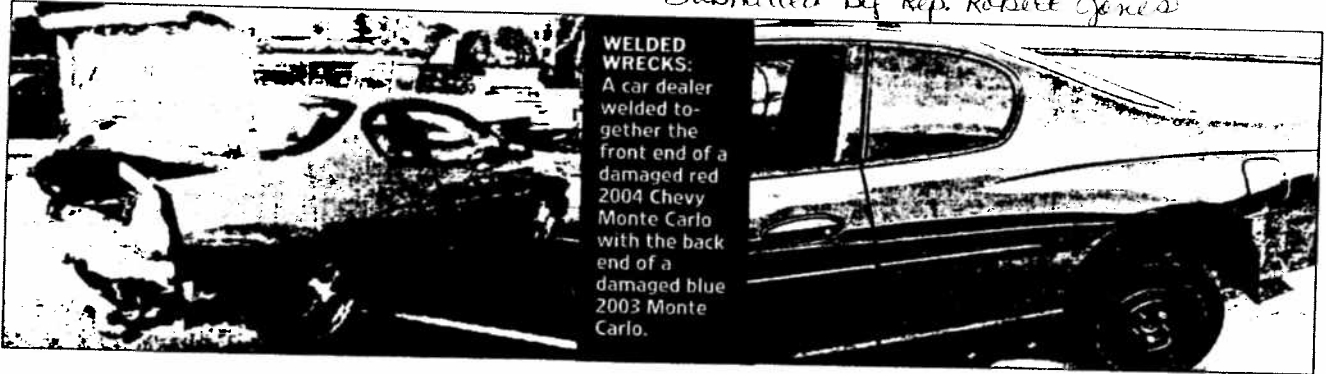


Submitted by Rep. Robert Jones



**WELDED WRECKS:** A car dealer welded together the front end of a damaged red 2004 Chevy Monte Carlo with the back end of a damaged blue 2003 Monte Carlo.

Dani Liblang

**TWO SMASHED MONTE CARLOS ARE WELDED TOGETHER AND SOLD AS A NEARLY NEW CAR. BUYERS ARE OUT \$20,350, EXPERTS SAY, BECAUSE MICHIGAN'S CONSUMER PROTECTION LAW IS A WRECK.**

# BUYER BEWARE

Critics say state law has been gutted. Nonsense, say business groups.

By DAVID ASHENFELTER  
 FREE PRESS STAFF WRITER

When Paulette Day rolled out of a Southgate car dealership in a bright red Chevy Monte Carlo in 2004, she thought she was buying a nearly new ride.

Later, the 38-year-old Romulus homemaker was shocked to learn her \$20,350 GM-certified used car actually was two wrecks that a Macomb County car dealer welded together and sold to a broker, which sold it to Rowan Pontiac-GMC.

Now, five years later, Day and her husband are waging an uphill legal battle to get their money back — a task made more difficult by two Michigan Supreme Court decisions that gutted the state's Consumer Protection Act.

In 10 years, consumer advocates say, the court has turned one of the nation's best consumer protection laws into one of the worst. A national group says Michigan and Rhode Island are "The Terrible Two" in consumer protection.

But business groups say the laws are good enough and that reconstituting the act would spark frivolous lawsuits.

The Consumer Law Section of the State Bar of Michigan plans to report this week that, because of the rulings, nearly three-fourths of the 13,122 complaints the attorney general received last year are no longer covered by the act.

**MICHIGANDERS LEARN HARD  
 REALITY OF CONSUMER LAW**



Photos by REGINA H. BOONE/Detroit Free Press

**UNHAPPY CONSUMERS:** Maryann Heitz, front, Paulette Day and James Day thought they were purchasing a nearly new Chevy Monte Carlo in 2004 from the Rowan Pontiac-GMC dealership. After a relative told them the car may have been in an accident, they said the dealership refused to take it back — despite assurances that they could return it within three days or 150 miles under GM's satisfaction guarantee. Heitz also says she was tricked into being the primary owner rather than

St. Pon...  
 ometer, T...  
 Wheel, Cruise...  
 Wipers, Rear Defroster...  
 Side Airbag, Front Buckle...  
 AS, Passenger Side Airbag, AM...

**Features & Benefits**

- Automatic 4-Speed Shifting: 6 years / 60,000 miles
- Power Windows: 100+
- Power Locks: Yes
- Remote Assistance: Yes
- Return/Exchange Program: 3 days / 150 miles
- Special Financing: Yes
- Lease/Ter is Certified: No

36,000 mile

820304&dealer\_id=724

# Big car purchases turn to nightmares



**HIDDEN CLUES:** Maryann Heitz, left, Paulette Day and James Day bought a Chevy Monte Carlo in 2004 that they later found out was two wrecks welded together. A relative spotted blue paint on the back of the gas cap door said it may have been in an accident.

## From a pieced together car to a money-pit home, Mich. consumers find little refuge in gutted law

By DAVID ASHENFELTER  
FREE PRESS STAFF WRITER

Paulette and James Day said they became suspicious of their newly purchased 2004 Chevy Monte Carlo when a relative spotted blue paint on the back of the gas cap door and told them it might have been involved in an accident.

But they said the dealership, which described the car as a dealer demo, refused to take it back despite assurances that they could return it within three days or 150 miles under General Motors Corp.'s satisfaction guarantee.

"I feel taken, I feel violated," Paulette Day said.

Day said they didn't realize their car had been pieced together until six months later when they hired a lawyer, who had the car examined by an expert. GM's Web site says it doesn't approve of the practice, called clipping, which is relatively common.

"No consumer would ever expect that two vehicles welded together make a GM-certified used car," said Day's lawyer, Dani Liblang of Birmingham, who is suing the company that clipped the cars together, the broker that sold it to the Rowan Pontiac-GMC dealership, and GM, which relied on the dealer to thoroughly inspect the car.

### Rulings 'against the public interest'

Former state Attorney General Frank Kelley, who used the 1976 Consumer Protection Act to hunt down rogue businesses, says state Supreme Court rulings in 1999 and 2007 have turned the law into mush, leaving people like the Days in the lurch.

"I'm sick about what's happened to the Consumer Protection Act," Kelley said. "For years, since its introduction, the act was always supported and interpreted freely whenever it was contested in the courts."

"Regrettably, that period has come to an end with interpretations that have, in my judgment, been against the public interest."

But business groups, which have fiercely opposed efforts to beef up the law, say there are enough laws on the books to protect consumers.

"The Chamber of Commerce has a long-standing policy in opposition to expanding the Consumer Protection

### Exempt from the law

The Michigan Supreme Court ruled in 1999 and 2007 that businesses regulated by other laws are no longer subject to the Michigan Consumer Protection Act. Experts said the decisions have turned Michigan into a buyer-beware state.

Some of the exempted businesses:

- Banks
- Mortgage brokers
- Debt collectors
- Finance companies
- Home builders
- Home improvement contractors
- New and used car dealers
- Auto repair shops
- Funeral homes
- Plumbers and electricians

Source: Michigan Consumer Law Section of the State Bar of Michigan

Act," said its Lansing lobbyist, Wendy Block, who spoke out against a 2007 measure to restore the act. She said the legislation would open the flood gates to needless lawsuits.

Until something changes, consumers lawyers say, more and more buyers will wind up feeling cheated with little recourse to do anything about it.

In the Days' case, GM wouldn't comment but blamed the dealership in court documents for giving the car the GM stamp of approval. The company that assembled it and the broker that sold it to Rowan say they disclosed that it had been in an accident. Rowan Pontiac closed last August and no longer is a party to the suit.

The dealership, in court papers, neither admitted nor denied wrongdoing.

While the case chugs along in Macomb County Circuit Court, the Days say they are stuck with a potential death trap that makes odd noises and prematurely wears out tires. And they're among a growing number of Michigan consumers to learn the new reality of consumer protection in the state.

The Legislature enacted the Michigan Consumer Protection Act with strong support from Democrats and Republicans. It banned 29 unfair, deceptive or unconscionable business practices in the sale of goods and services and empowered the state attorney

general to go to court to halt such conduct.

It also let consumers sue dishonest businesses and collect attorney fees if they won, and it helped short-staffed state officials patrol the marketplace.

Every state has a Consumer Protection Act. They're designed to fill in the gaps left by other laws and regulations.

### The act's erosion

In 1999, the conservative majority of the Michigan Supreme Court ruled that businesses whose general conduct was specifically authorized by state law were exempt from the act, even if the conduct was unfair or deceptive.

The court reaffirmed the decision in 2007, experts said, effectively exempting most, if not all, businesses regulated by state or federal law, such as home improvement contractors, mortgage companies and plumbers.

"If we had a strong Consumer Protection Act, this case would have been a slam dunk," Liblang said of the legal brawl over the Monte Carlo. She said the rulings forced her to rely on other laws to make her case.

The opinions were written by Justice Robert Young Jr., who declined last week to comment.

He was joined in the first decision by Maura Corrigan, Elizabeth Weaver, the deceased James Brickley and Clifford Taylor, who was voted out of office last year.

Young was joined in the second case by Corrigan, Taylor, Weaver and Stephen Markman. Justices Michael Cavanagh and Marilyn Kelly dissented in both cases.

As a result, some lawyers say they pursue consumer cases in only federal court.

Attempts to fix the law have gone nowhere.

State Rep. Robert Jones, D-Kalamazoo, said corrective measures he and other lawmakers have introduced have died in the face of opposition from the Michigan Chamber of Commerce and other business groups. He plans to reintroduce the measure soon. And he will face more opposition from business groups.

"The proposed legislation would create new and costly litigation opportunities for personal injury attorney

## Michigan, Rhode Island dubbed 'Terrible Two' for consumers

The National Consumer Law Center said in February that Michigan and Rhode Island are "the Terrible Two" because their high courts eviscerated their consumer protection acts.

"While these two states have UDAP statutes that appear strong on paper, they provide almost no actual protection to consumers," the Boston-based advocacy group said. Such statutes are known in the consumer protection community as Unfair and Deceptive Acts and

Practices (UDAP) laws. "In fact, the UDAP statutes in these states are worse than ineffective, as they give the appearance of providing protection for consumers while actually providing nothing."

Unless consumers can pursue those businesses under other laws — and the case is lucrative enough to persuade a lawyer to take it — they're usually out of luck, experts say.

DAVID ASHENFELTER



**NOT SO SWEET HOME:** Lindsay and Kenneth Duneske — with daughters Evie, 6, and Alayna, 2 — thought they were getting their dream house in 2007 after the builder assured it would fix buckling roof shingles and many other problems on the \$306,000 home. But the builder reneged. "We have been ... cheated," Lindsay Duneske said.

neys against 80 different businesses, trades and professions which are already regulated by and subject to penalties under state and federal law," said Block, the Chamber's lobbyist.

Lee Schwartz, a Michigan Association of Home Builders lobbyist who also opposed Jones' bill, said consumers have other avenues to pursue problematic companies, including going after their licenses through the state's regulatory process.

### Michigan's 'dirty little secret'

But consumer experts said such options provide only piecemeal protection and fail to protect honest companies from being undercut by dishonest competitors.

"You can't have merchants taking advantage of a black hole exception in the law and have fair competition," said Gary Maveal, a University of Detroit Mercy law professor and member of the Consumer Law Section of the State Bar of Michigan.

"We need to encourage the best in merchants and reward those who are playing by the rules," he said.

Maveal said he's disappointed Gov. Jennifer Granholm, a former attorney general, and Attorney General Mike Cox haven't fixed the problem.

Cox didn't respond to Maveal's concern, but Granholm spokeswoman Liz Boyd said the governor has repeatedly supported legislation to repair the act.

"But she can't unilaterally sign leg-

islation into law that hasn't been passed by both chambers of the Legislature," Boyd said.

Lindsay Duneske said she discovered how weak Michigan's Consumer Protection Act has become after the company that built her new home in Milan kept putting off needed repairs.

She said she and her husband bought the house in 2007 for \$306,000, after receiving assurances that the builder would fix buckling roof shingles and vinyl siding, leaky windows and other problems.

After the builder reneged, Duneske said, she couldn't find a lawyer to help her because home builders are no longer covered by the Consumer Protection Act.

She said the builder eventually went out of business and its lawyer got a court order to stop her from pestering him.

"We have been totally and completely cheated," Duneske said, adding that she feels betrayed by state officials. "We are looking to move, and it will be anywhere but Michigan."

Southfield consumer lawyer Adam Taub, whom Duneske consulted, said the state Supreme Court turned Michigan into a buyer beware state.

"I get 15 calls a month from people I can't help," Taub said. "And they're always shocked to discover that Michigan no longer has an effective Consumer Protection Act.... It's Michigan's dirty little secret."

CONTACT DAVID ASHENFELTER: DASHENFELTER@FREEPRESS.COM

Submitted by  
Rep. Robert Jones



May 8, 2009

## Put teeth back in consumer protection

It was a preposterous theory from the beginning.

In two landmark cases in 1999 and 2007, the Republican state Supreme Court majority installed by Gov. John Engler effectively gutted the Michigan Consumer Protection Act, ruling that the intent behind the law was to exempt nearly three-quarters of the businesses that generate the most consumer complaints.

Both rulings, authored by Justice Robert Young Jr., contravened 23 years of aggressive enforcement in which the attorney general and consumer advocates relied on the MCPA to hold unscrupulous businesses accountable for deceptive and unfair practices.

In a story by Free Press reporter David Ashenfelter on Sunday, the consequences of that judicial activism were laid bare. Caveat emptor, or buyer beware, doesn't begin to explain the peril consumers in Michigan face. Dishonest merchants can take advantage of customers, and there's nothing to be done about it. That includes nearly every company in the top three complaint categories: credit and finance; gasoline, fuel and energy; and telecommunications, satellite and cable TV.

The MCPA, passed in 1976 as one of the nation's most potent consumer protection laws, is "now toothless," according to recent analysis by the consumer law section of the Michigan Bar.

It's time for Michigan legislators to reject the Engler court's absurd claim that those who drafted the state's consumer protection law deliberately placed most businesses beyond its reach.

The Democratic House stands ready to pass legislation explicitly reiterating the commonsense view that authors of the 1976 law meant to exempt only transactions *specifically* authorized by the state, not illegal conduct pursued under the cover of a general license to do business.

All that Republican Attorney General Mike Cox, Senate Majority Leader Mike Bishop and their Republican colleagues have to do is answer the question: Is it really their *intent* to exempt three-quarters of Michigan businesses from the ethical rules laid down in the MCPA? Or did the justices who defanged the state's consumer protection overreach?

Unprotected Michigan consumers are dying to hear the answer.

# Consumer protection law lacks teeth, a report says

Many businesses exempt by court rulings

By **DAVID ASHENFELTER**  
FREE PRESS STAFF WRITER

Michigan's primary law for protecting consumers is toothless thanks to state Supreme Court decisions that exempted many business from the statute, a State Bar of Michigan committee said Monday in a report.

The 11-page study said 72% of the 13,122 consumer complaints Attorney General Mike Cox received in 2008 involved businesses no longer covered by the Michigan Consumer Protection Act. This includes credit and finance companies, new and used car dealers, home improvement contractors and telecommunications and cable television companies.

"The weakening of the ... act comes at a time when consumer protection is needed more than ever," said Gary

Victor, an Eastern Michigan University business law professor who coauthored the Consumer Law Section report.

"Our economy requires consumer protection laws to protect consumers and prevent honorable businesses from being put at a competitive disadvantage by businesses using unfair or deceptive practices," Victor added.

The study said the Michigan Supreme Court effectively neutralized the act in 1999 and 2007 by ruling that any businesses regulated by other state or federal laws or regulations are exempt, even if the alleged conduct was wrong.

"The interpretation ... leaves consumers with few if any remedies to redress unfair or deceptive practices



A study said 72% of the complaints Attorney General Mike Cox received in 2008 involved businesses not covered by the law.

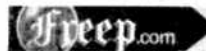
they may have been subjected to by such regulated businesses," the report said.

The report urged the public and lawmakers to support legislation to repair the act.

Attorney General Mike Cox spokesman Matt Frendewey wouldn't say whether he thought the Supreme Court had damaged the act.

But, he said: "If legislators have ideas to protect consumers, we have an open door. We use the law every day to protect consumers."

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Read the entire 11-page report

May 5, 2009



May 4, 2009

## State's consumer law 'toothless' due to exemptions, report says

By DAVID ASHENFELTER  
FREE PRESS STAFF WRITER

Michigan's primary law for protecting consumer is "toothless" because of state Supreme Court decisions that exempted many businesses from the statute, the Consumer Law Section of the State Bar of Michigan said in a report today.

The 11-page study said 72% of the 13,122 consumer complaints Attorney General Mike Cox received in 2008 cover businesses that are no longer covered by the act. This includes credit and finance companies, new and used car dealers, home improvement contractors and telecommunications and cable television companies, the report said.

"The weakening of the... act comes at a time when consumer protection is needed more than ever," said Gary Victor, an Eastern Michigan University business law professor and coauthor of the report. "Our economy requires consumer protection laws to protect consumers and prevent honorable businesses from being put at a competitive disadvantage by businesses using unfair or deceptive practices."

Exempting business from the act "is not good for consumers or free, fair competition," Victor added.

The Legislature passed the act in 1976.

The study said the Michigan Supreme Court effectively neutralized the act in 1999 and 2007 by ruling that any businesses regulated by other state or federal laws or regulations were exempt, even if the conduct involved unfair or deceptive practices.

"The interpretation of the MCPA leaves consumers with few if any remedies to redress unfair or deceptive practices they may have been subjected to by such regulated businesses," the report said.

The report urged the public and their representatives in the Michigan Legislature to support legislation to counteract the rulings.

There was no immediate comment from Attorney General Mike Cox. A spokeswoman for Gov. Jennifer Granholm said in a story in Sunday's Free Press that the governor had supported legislation to correct the problem, but that the measures she has supported require lawmakers' support.

Click [http://www.freep.com/uploads/pdfs/2009/05/0504\\_Consumer Law Section report.pdf](http://www.freep.com/uploads/pdfs/2009/05/0504_Consumer Law Section report.pdf) here to view the report.

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Submitted by  
Rep. Robert Jones

## **Michigan's Consumer Protection Act "worse than worthless" ... "if not the worst."**

<http://oaklandlegalnews.com/subscribers/section E/on the docket.asp>

### **Oakland Legal News**

March 7, 2008

## **Reviving Michigan's Consumer Protection Act**

*By Gary M. Maveal*

Among the controversial rulings by the Michigan Supreme Court in the last decade, the most notorious may be *Smith v. Globe Life Insurance Co.* 460 Mich 446; 597 NW2d 28 (1999). The Court's decision in *Globe Life* largely gutted our Consumer Protection Act (MCPA) by immunizing most licensed businesses against claims of unfair dealing.

A brief history of the issue may explain why consumer groups are pressing our Legislature to redress the Court's perverse construction of the statute.

### **The MCPA's Coverage and Approach**

Passed with strong bipartisan support in 1976, the MCPA was designed to give consumers comprehensive protection against unfair, unconscionable, or deceptive practices in the sale of goods and services. The Act defined 29 prohibited unfair "methods, acts, or practices" such as grossly excessive prices or boilerplate forms that might confuse consumers of their legal rights. Critically, the MCPA also included attorney fees provisions to encourage the private bar to complement enforcement by the Attorney General and state regulators.

In negotiating the measure, legislators accepted suggestions from state agencies – principally the Department of Commerce – on how to enlist regulatory bureaus' expertise in policing the new consumer protections. The Act's drafters rejected the idea that insurers, banks, and other businesses already subject to administrative regulation would be totally exempted from the new statute.

### **The Exemption Expanded by Globe Life**

The MCPA carried an exemption that it would not apply to "a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." If a state or federal law specifically authorized a certain practice – such as an auto repair shop charging more than 10% above its written estimate if it obtained the customer's oral consent thereto – the exemption would preclude a consumer from claiming that the shop's conduct was somehow unfair or deceptive under the MCPA. This proviso gave merchants safe harbor in following the terms of a particular type of transaction or engaging in a particular type of conduct that had been prescribed

by statute or approved by regulators.

The narrow scope of the exemption was applied in Attorney General v. Diamond Mortgage Co., 414 Mich. 603; 327 N.W.2d 805 (1982).

The Defendant, cited for usurious and deceptive mortgage practices, won dismissal in the trial court on grounds that its mortgage brokering "was under the auspices of the Michigan Department of Licensing and Regulation" and thus within the exemption.

The Michigan Supreme Court reversed in a unanimous decision.

It held that the exemption was not applicable because the Defendant's real estate broker's license "was not specific authority for all of the conduct and transactions of the licensee's business."

However, Smith v. Globe Life recast Diamond Mortgage and essentially rewrote the exemption to carve out licensed businesses from coverage under the MCPA.

Smith claimed that Globe Life's certificate of credit life insurance coverage was false and misleading and that benefits had been denied based upon underwriting criteria not disclosed by either the insurance application or the certificate.

There was no evidence that regulators had specifically approved the use of the forms at issue

Justice Young's opinion for the Court in Globe Life distorted the Diamond Mortgage opinion. He posited that Diamond Mortgage "instructs that the focus is on whether the transaction, not the alleged misconduct, is 'specifically authorized.'"

"Without further reasoning why a general business license warranted a "global" immunity from a consumer protection statute, the Court concluded that the relevant inquiry under the exemption was:  
 "[N]ot whether the specific misconduct alleged by the plaintiffs is specifically authorized. Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited."

Globe Life failed to seriously consider the statute's framework and dismantled a crucial balance struck by the Legislature in reaching compromise on the Act. Under this ruling, serious claims of unfair practices by heating and plumbing contractors, home builders, and others have been summarily dismissed on the simple grounds that the defendant is licensed.

#### **The Legislature never intended such an absurd result.**

A major impetus for the U.S. consumer movement in the 1970's was the widespread belief among law enforcement and legislatures that administrative regulation was not adequately protecting consumers.

Statutes such as the MCPA consumers thus broadly defined "trade or commerce" and proscribed blatantly unfair business practices.

It is common knowledge that regulatory agencies still offer consumers little practical recourse against unscrupulous businesses and that value of Michigan's innovative consumer protection statute has been seriously undermined by Globe Life.

Indeed, a new report by the National Consumer Law Center concludes that the Court has rendered the MCPA "worse than worthless" and that Michigan now has one of the weakest consumer protection statutes in the nation, "if not the worst."

#### **A Legislative Fix: H.B. 4217**

The State Bar Consumer Law Section is working with a consortium of citizens' groups to persuade the Legislature to correct the result in Globe Life.

The Campaign to Protect Michigan's Consumers supports H.B. 4217, which would replace the words "transaction or conduct" in the exemption with "methods, acts or practices." We hope this measure will eliminate the Court's immunity for licensed businesses and restore balance and coherence to the MCPA.

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*Gary M. Maveal is a professor of law at University of Detroit Mercy School of Law and a member of the Consumer Law Section Council of the State Bar Michigan. His article on the Globe Life case is forthcoming in the Wayne Law Review. He can be reached at mavealgm@udmercy.edu.*



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## Court Ruling Makes Michigan's Consumer Protection Act Worse Than Worthless

Particularly today with rampant mortgage fraud and high foreclosure rates, it is essential for Michigan homeowners and other citizens to have adequate access to justice to redress wrongs perpetrated against them. In all 50 states and the District of Columbia, the key statute protecting the public from marketplace misconduct is the "unfair and deceptive acts and practices" or "mini-FTC" statute—referred to here as the state UDAP statute.

The Consumer Law Section of the Michigan State Bar and the National Association of Consumer Advocates have commissioned the National Consumer Law Center to review Michigan's version of a UDAP statute, Mich. Comp. Laws Ann. § 445.901, *et. seq.*, called the Michigan Consumer Protection Act. The statute prohibits "unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." On its face, the statute appears an ideal protection against overreaching and fraudulent practices by loan brokers, mortgage lenders, car dealers, home improvement contractors, pay day lenders, and other sellers. And in states other than Michigan, these statutes prove effective in combating this type of misconduct.

Unfortunately, in Michigan, the Consumer Protection Act is worse than worthless. The statute gives the appearance that it is protecting the public, when in fact a recent Michigan Supreme Court ruling strips the statute of virtually any benefit it can potentially have for the public. From the statute's enactment in 1976, the public has come to rely on significant protections the statute used to, but no longer provides. In the bitterest of ironies, consumers are relying on the Consumer Protection Act when they shop in the marketplace, but that reliance is now misplaced—the statute itself is a form of deceptive advertising.

For over 25 years, the National Consumer Law Center has closely analyzed all state UDAP statutes and case law, and publishes *Unfair and Deceptive Acts and Practices* (6<sup>th</sup> ed. and 2007 Supp.) (1190 pp.). Over the last few months we have again carefully surveyed each state UDAP statute, and we can say with confidence that Michigan now stands as having one of the worst such UDAP statutes in the country, if not the worst.

### **A Fairly Well-Conceived Statute with One Enormous Problem— It Doesn't Apply to Anything**

The Michigan Consumer Protection Act on its face is not that bad a statute. It prohibits a broad range of unconscionable, unfair or deceptive conduct, and it provides injured consumers with reasonable remedies to challenge this misconduct, allowing a successful consumer to recover actual damages and attorney fees.

The statute has one fatal flaw that, if uncorrected, makes the statute worse than worthless in the overwhelming majority of consumer transactions. This is because the Michigan Supreme Court has recently interpreted ambiguous statutory language in a manner whose logical extension is to exempt from the statute virtually every consumer transaction one can think of—lending, mortgages, home sales, car sales, car repair, mobile home sales, mobile home parks, home improvement contracts, plumbers, electricians, utilities, and anyone else who is regulated by the state in any fashion. We say worse than worthless because the statute gives the illusion that it does something, when in fact it does virtually nothing.

No other state exempts such a broad range of transactions from its UDAP statute, and virtually no other state even comes close. Instead, most state UDAP statutes apply quite broadly to most types of consumer transactions. In fact, that is their distinguishing characteristic, that the statutes prohibit a broad and evolving range of unfair or deceptive conduct, and do not allow scam artists to come up with new frauds not covered by the statute.

### **How a Michigan Supreme Court Decision Obliterated the Statute**

A June 6, 2007 Michigan Supreme Court case, *Liss v. Lewiston-Richards, Inc.*,<sup>1</sup> has relegated the Michigan Consumer Protection Act to oblivion. Now this “consumer protection act” protects virtually no consumers. Virtually every type of merchant, lender, insurer, or other seller is now exempt from the statute.

The Court was asked to consider the Michigan Consumer Protection Act’s exclusion for transactions “specifically authorized” by state or federal agencies.<sup>2</sup> Most state UDAP statutes do not contain this limiting language. Where a state statute does contain this or similar language, the courts typically interpret this as exempting only specific practices that are explicitly permitted by a state or federal agency.

For example, in most states with similar language, an action cannot be brought against a lender for charging 36% interest, where a state agency approves of this interest rate. On the other hand, in these states, charging 360% interest (in excess of the state maximum) would be actionable. Not in Michigan. A consumer charged 360% interest would have no remedy under the Michigan Consumer Protection Act because Michigan’s

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<sup>1</sup> 478 Michigan 203, 732 N.W. 2d 514 (2007).

<sup>2</sup> Mich. Comp. Laws 445.904(4).


mortgage, home improvement, automobile sales, and other fraud are remedied, while not penalizing merchants who are following the instructions of their licensing authority. It is not necessary to exempt virtually all sellers from the statute to avoid a seller being penalized for conduct that a state agency has approved.

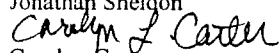
**About the National Consumer Law Center**

The National Consumer Law Center (NCLC) is America's consumer law expert, a national legal resource and advocacy organization focusing on the legal needs of consumers, especially low-income and elderly consumers. NCLC is a non-profit, 501(c)(3) and legal aid organization. Our typical staff attorney has 27 years of specialized consumer law expertise. For 38 years legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned to NCLC for legal answers, policy analysis, and technical and legal support.

NCLC is the author of the widely acclaimed volume, *Unfair and Deceptive Acts and Practices* (6<sup>th</sup> ed. 2004 and 2007 Supp.) (1190 pp.) that examines in detail all 50 states' unfair and deceptive acts and practices (UDAP) legislation, regulations, and case law. NCLC also authors numerous other consumer law treatises covering most significant areas of consumer law, and provides training and consultation on UDAP and other consumer law issues.

Respectfully Submitted,

  
Jonathan Sheldon

  
Carolyn L. Carter

Submitted by  
Rep. Robert Jones.

# Is the Michigan Consumer Protection Act Dead?

*MPLP Summer 2007 Consumer Law Section Newsletter Article*



QUARTERLY

MICHIGAN POVERTY LAW PROGRAM

Issue 34, Summer 2007

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## Is the Michigan Consumer Protection Act Dead?

*By Lorrain S.C. Brown and Joseph Ferrentino, MPLP Law Clerk*

In its recent opinion (*Liss v Lewiston-Richards*, 478 Mich 203 (June 6, 2007)), the Michigan Supreme Court confirmed that the Michigan Consumer Protection Act (MCPA) is indeed unavailable to Michigan consumers.

The MCPA was enacted to protect consumers from “unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce.” MCL 445.903. However, the MCPA exempts any “transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.” MCL 445.904(1)(a).

The demise of the MCPA began in 1999 in *Smith v. Globe Life Insurance Co.*, 460 Mich 446 (1999). In *Globe*, the Michigan Supreme Court, when interpreting the MCPA exemption, held that the focus of the exemption “is not whether the specific misconduct alleged by the plaintiffs is ‘specifically authorized’”. Instead, “it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.” *Globe*, 460 Mich at 465. Under the *Globe* Court’s interpretation, all industries whose general conduct was specifically authorized were now exempt from the MCPA. After *Globe*, consumer advocates tried to limit *Globe* to the insurance industry. However, the lower courts began applying the *Globe* interpretation to other regulated industries.

Now the Supreme Court has effectively eviscerated the MCPA. In *Liss*, the homeowners entered into a contract with the defendant residential builders for the construction of a new home. The builders, however, failed to complete the home on time. Moreover, the construction that was completed was “not done in a workman-like manner.” Thus, the homeowners filed an action alleging breach of contract, breach of warranty, and other causes of action. They also alleged that the builders violated the MCPA. The builders argued that the transaction, residential home building, was exempt from the MCPA.

In *Liss*, the Supreme Court held that “under MCL 445.904(1)(a), residential home builders are exempt from the MCPA because the general transaction of residential home building, including contracting to perform such transaction, is ‘specifically authorized’” by law. In reaching this conclusion, the Court has now confirmed that the MCPA exempts licensed and regulated businesses from the Act.

Unfortunately, the majority was not persuaded by dissenting Justices Cavanagh and Kelly. In his dissent, Justice Cavanagh stated:

“I believe that *Smith [v Globe]* should be overruled . . . the test adopted in *Smith [v Globe]* is so broad that it precludes many permissible claims under the Michigan Consumer Protection Act . . . Moreover, not only was *Smith [v Globe]* wrongly decided, the *Smith [v Globe]* decision defies practical workability because it disallows numerous claims that are actually allowed under the relevant statutory language.”

Justice Kelly believed the conduct at issue was not exempt from the MCPA and the holding of *Smith [v Globe]* should be limited strictly to cases involving the insurance industry. Justice Kelly stated that with this decision, “the majority has essentially decided that merely being a licensee in a regulated industry qualifies one for the exemption.” She correctly concludes that “the result may well be that a large number of Michigan businesses will be able to engage in unfair or deceptive practices without running afoul of the MCPA.”

This ruling is unfortunate for Michigan’s consumers. Our only hope now is in the Legislature.

Long live the MCPA!

*Submitted by  
Rep. Robert Jones*

## Current bills affecting the Michigan Consumer Protection Act.

Document	Type	Description
SB 0573 of 2009	Senate Bill	Consumer protection; unfair trade practices; application of Michigan consumer protection act to actions expressly permitted by law; clarify. Amends sec. 4 of 1976 PA 331 (MCL 445.904).
SB 0584 of 2009	Senate Bill	Consumer protection; unfair trade practices; application of Michigan consumer protection act to actions expressly permitted by law; clarify. Amends sec. 4 of 1976 PA 331 (MCL 445.904).
SB 0700 of 2009 (PA 0092 of 2009)	Senate Bill	Trade; securities; adoption of new uniform securities act (2002); update uniform securities act references in Michigan consumer protection act. Amends sec. 20 of 1976 PA 331 (MCL 445.920).
HB 4051 of 2009	House Bill	Consumer protection; unfair trade practices; application of Michigan consumer protection act to certain unfair trade practices in insurance code and certain other conduct authorized by law; clarify and revise. Amends sec. 4 of 1976 PA 331 (MCL 445.904).
HB 4693 of 2009	House Bill	Trade; securities; adoption of new uniform securities act (2002); update uniform securities act references in Michigan consumer protection act. Amends sec. 20 of 1976 PA 331 (MCL 445.920).
HB 4915 of 2009	House Bill	Consumer protection; unfair trade practices; application of Michigan consumer protection act to certain conduct generally authorized by law; clarify and revise. Amends sec. 4 of 1976 PA 331 (MCL 445.904).